

Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JENNIFER P. SCHWEICKERT,

Plaintiff,

vs.

HUNTS POINT VENTURES, INC.; HUNTS
POINT VENTURE GROUP, LLC; CHAD
and ELIZABETH RUDKIN, and their marital
community comprised thereof; JOHN DU
WORS and AMBER DU WORS, and their
marital community comprised thereof; and
DOES 1-4,

Defendants.

No. 13-CV-675RSM

DEFENDANTS DU WORS' MOTION
TO PERMIT FILING OF AMENDED
MOTION FOR SUMMARY JUDGMENT
AND ALLOW OVER-LENGTH BRIEF

NOTED FOR HEARING:
OCTOBER 31, 2014

I. INTRODUCTION

Pursuant to Fed.R.Civ.P. 16(b)(4), LCR 16(b)(4), and LCR 7(f), Defendants John and Amber Du Wors move this Court to allow a two-day late filing of an Amended Motion for Summary Judgment, to modify the Case Scheduling Order to allow a two-week extension of the hearing date for dispositive motions, and to allow a one-page over-length brief in support of Defendants' Motion for Summary Judgment.

II. FACTS

The "Order Setting Trial Date & Related Dates," (Dkt # 24), provides in relevant part

“All dispositive motions must be filed by
and noted on the motion calendar no
later than the fourth Friday thereafter
(see CR 7(d))”

October 14, 2014

On October 14, 2014, Du Wors did file a motion for summary judgment. (Dkt # 80). This summary judgment motion was timely, and generally set forth substantially the same or similar facts and arguments as appear in the amended motion for summary judgment. After filing, counsel concluded that a later filing date might be warranted, namely, Thursday, October 16, 2014, which would still set the motion for hearing on November 7, 2014.

Normal practice in the Western District allows filing of a four-week motion on the Thursday 22 days before the mandatory cutoff. Counsel thought that there was a potential ambiguity or inconsistency between the indicated cutoff date for filing, October 14, 2014, a Tuesday, which would set the motion hearing on November 7, 2014, and normal practice, which would allow filing on Thursday, October 16, 2014 for the same hearing date.

Accordingly, the motion was redrafted to hopefully set forth Defendants’ arguments in a more cogent and succinct form. The arguments and legal authority are essentially the same as those set forth in the initial filing.

Notwithstanding counsel’s best efforts, the redraft went into the evening of Thursday, October 16, 2014, and was not ready for filing until sometime after 11:30 p.m. Due to counsel’s lack of proficiency in electronic communication, initial efforts made well before midnight, failed. Counsel takes sole responsibility for the late filing, which eventually succeeded at approximately 12:05 a.m., Friday, October 17, 2014.

The amended summary judgment motion submitted on October 17th is approximately 14 lines over-length. (Dkt # 83). Although counsel did not seek Court permission before filing, the Du Wors request the Court to allow the over-length brief.

III. POINTS AND AUTHORITIES

A. Du Words requests that the Court accept their slightly over-length brief.

The district court has discretion to permit an over length brief, even when the request for such a brief is not made before filing. See e.g., *Berg v. United States*, C13-246RAJ, 2014 WL 1350899 (W.D. Wash. Apr. 3, 2014) (“his reply should not have exceeded fifteen pages. Local Rules W.D. Wash. CR (“LCR”) 7(f)(4). Nevertheless, the court has considered the entirety of petitioner's twenty-one-page reply brief”); *Phillips v. Colvin*, 12-CV-5200-BHS-JR, 2013 WL 1725657 (W.D. Wash. Mar. 20, 2013) report and recommendation adopted, C12-5200 BHS, 2013 WL 1725962 (W.D. Wash. Apr. 22, 2013) (permitting over length brief filed without prior permission).

Du Wors filed an amended motion for summary judgment that is less than one page over-length. Du Words did not have time after drafting the motion to seek prior approval from the Court for the extra length, but requests now that the Court permit the additional page. There is no prejudice to Plaintiff in permitting the additional page, and Du Wors is willing to provide Plaintiff Schweickert with an additional page, if necessary, so that the pages of the parties are equivalent.

B. Du Wors requests to Court to slightly modify the case schedule to permit filing of the amended motion for summary judgment two-days after the cutoff and to set the hearing an additional two weeks later to provide Plaintiff Schweickert with time to respond.

Fed.R.Civ.P. 1 instructs that the Rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action. Du Wors concedes that its actions in regard to this specific motion have not been a model for the prosecution of a motion under the local rules. However, the most just and inexpensive resolution to the current situation is to permit the filing of the amended summary judgment, essentially two days after the cutoff. In order to assure there is no prejudice to Plaintiff Schweickert, Du Wors proposes a

1 corresponding two-week extension on the hearing date, provided Plaintiff Schweickert more
 2 than enough time to respond to the amended motion. Here, the “Order Setting Trial Date &
 3 Related Dates” Docket No. 24, 9/13/13, provides in relevant part
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5 “All dispositive motions must be filed by 6 and noted on the motion calendar no 7 later than the fourth Friday thereafter (see CR 7(d))”	October 14, 2014
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8 Counsel’s initial filing of the motion on Tuesday, October 14, 2014 was a conservative
 9 and literal reading of the case scheduling order. The order can, and arguably, should be read in
 10 a manner best calculated to implement the general rules regarding motion and the timeframes
 11 allowed the proponents and opponents of the motions to assert their respective position. Those
 12 timeframes are in general established by local rules, LCR 7(d).

13 Allowing a filing on Thursday does not prejudice Plaintiff Schweickert since the
 14 required response date would be the same for a Thursday filing as for a Tuesday filing. Since
 15 the response dates correspond to the hearing date, which is determined by reference to
 16 LCR 7(d).

17 Although counsel’s lack of proficiency in effecting electronic filing is hardly
 18 commendable, it is excusable neglect at worse. The delay was minimal and the likelihood of
 19 prejudice is vanishingly small. See *Archibald v. City of Hartford*, 274 F.R.D. 371, 376 (D.
 20 Conn. 2011) (“the Court will not find that the Defendants waived their right to file a motion to
 21 dismiss on the basis that their motion was filed a few minutes too late”); *Davis v. Joseph J.*
 22 *Magnolia, Inc.*, 640 F.Supp. 2d 38, 41 FN2 (D.D.C. 2009) (court overlooked the late filing by
 23 10 minutes of an opposition to a motion for summary judgment).¹

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 25 ¹ See also *O’Brien v. Napolitano*, 2012 WL 423732, at *9 (N.D.Cal. Feb. 8, 2012) (Court excused lateness of
 filing of documents 35 minutes after deadline for filing “[b]ecause the delay was minimal and [opposing party] has
 not demonstrated prejudice”); *Rogers v. Fukase*, 2011 WL 2939851, at *1 (D.Haw. July 18, 2011) (Court denied
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Du Wors recognizes that Plaintiff Schweikert should probably be granted an extension of time to file a response brief, and requests that the Court's grant leave to extend the hearing date for the benefit of Plaintiff Schweikert, to assure that she has sufficient time to respond to the amended summary judgment motion. Since this motion is noted for Friday, October 31st, two weeks after the last filing, the defendants would propose a two-week extension for the plaintiff to respond and a modification of the scheduling order, which would move the hearing date on the amended motion for summary judgment to November 21, 2014.

IV. CONCLUSION

Defendant Du Wors accordingly moves the Court to:

1. Permit the one-half page over length brief filed by Du Wors;
2. Permit the filing of Du Wors Amended Motion for Summary Judgment, which occurred on Friday, October 17, 2014, at 12:04 am; and
3. Re-note the hearing date of the motion for summary judgment to November 21, 2014 to provide plaintiffs sufficient time to respond to the amended motion..

Respectfully submitted this 22nd day of October, 2014.

LEE SMART, P.S., INC.

By: s/Sam B. Franklin

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motion to strike two filings, one filed 8 minutes late, and the other 10 minutes after midnight, where there is no evidence of prejudice to the opposing party); *Lopez v. United Parcel Serv., Inc.*, 2010 WL 728205, at *4 FN5 (N.D.Cal. Mar. 1, 2010) (Court overruled party's objection to documents supporting a motion for summary judgment being filed as much as 46 minutes after midnight, where it found no prejudice to the opposing party's ability to prepare an opposition and because the dispute should be resolved on its merit and all the evidence the parties submitted should be considered); *Hyperphrase Technologies, LLC v. Microsoft Corp.*, 56 Fed.R.Serv. 3d, 467, 2003 WL 21920041, at *1 (W.D.Wis. 2003) (Court forgives the tardiness of party filing its motion for summary judgment 5 minutes after midnight deadline and supporting documents up to 1:11 after the deadline).

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CERTIFICATE OF SERVICE

I hereby certify that on the date provided at the signature below, I electronically filed the preceding document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individuals:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED this ____ day of October, 2014, at Seattle, Washington.

Marie Vestal Sharpe, Legal Assistant